

Should K.S.A. 44-501(c) be applied to limit the claimant's benefits to medical expenses because claimant was not disabled for one week from earning full wages?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a review and modification proceeding brought pursuant to K.S.A. 44-528. The Appeals Board issued its initial award in this case on April 28, 1995, finding that claimant was entitled to benefits for a 9.2 percent permanent partial general disability. Respondent appealed, and the Court of Appeals reversed. The Court of Appeals held that since the injury did not cause claimant to be off work for one full week, he was not, based on provisions of K.S.A. 44-501(c), entitled to recover for permanent disability. Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. ____ (1996).

Claimant petitioned for review by the Kansas Supreme Court and while that petition was pending, the Kansas Legislature amended K.S.A. 44-501. In Senate Bill No. 649, the Legislature eliminated language in K.S.A. 44-501(c) requiring that a claimant miss at least one week. The amendment to K.S.A. 44-501(c) also stated that it would apply to all claims for injury occurring prior to the effective date of the amendment, "unless the claim has been fully adjudicated." Senate Bill No. 649, Section 2. This amendment became effective while the claimant's petition for review was pending before the Kansas Supreme Court. On May 3, 1996, the petition for review in this case was denied by the Supreme Court.

Claimant also at 260 Kan. ____ (1996) filed an Application for Review and Modification with the Administrative Law Judge pursuant to K.S.A. 44-528. The Administrative Law Judge ruled that this claim was not fully adjudicated at the time the amendment became effective. He so ruled on the basis of Kansas Supreme Court Rule 8.03 which provides, "If review is refused, the decision of the Court of Appeals shall be final as of the date of refusal and the mandate of the Court of Appeals shall be issued by the clerk forthwith." The Administrative Law Judge then noted that K.S.A. 44-528 allows review and modification in cases where the award "was excessive or inadequate." The Administrative Law Judge concluded that this award was inadequate and reinstated the original award by the Appeals Board, granting benefits based upon 9.2 percent permanent partial general disability.

After the Administrative Law Judge approved review and modification in this case, the Kansas Court of Appeals ruled that the retroactive application of the amendment to K.S.A. 44-501(c) would be an unconstitutional violation of due process. Osborn v. Electric Corporation of Kansas City, ____ Kan. App. 2d ____, 936 P.2d 297 (1997). The claimant in the Osborn case filed a petition for review by the Kansas Supreme Court and on July 10, 1997, the Supreme Court entered an order denying the petition for review. The Osborn decision is, therefore, now the law, and the amendment to K.S.A. 44-501(c) may not be applied retroactively.

In this case, claimant was not disabled from earning full wages for one week. Benefits must be limited to medical expenses only.

The Application for Review and Modification must be denied, and the decision by the Administrative Law Judge must be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award entered by Administrative Law Judge Robert H. Foerschler, dated October 7, 1996, should be, and is hereby, reversed. Claimant's request for review and modification is denied.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kathryn P. Barnett, Kansas City, KS
John David Jurcyk, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director